SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

ILLINOIS CENTRAL RAILROAD COMPANY, a Corporation,
Petitioner,
vs.
WESLEY C. KELLEY,
Respondent.

No. 819

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Missouri
and
BRIEF IN SUPPORT THEREOF.

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INDEX.

Cases Cited.

Statutes Cited.

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PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Missouri.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now Illinois Central Railroad Company, a corporation, and respectfully petitions this Honorable Court to grant a writ of certiorari to review the opinion and judgment of the Supreme Court of Missouri, Division No. 1, rendered and entered on the 7th day of December, 1943, in the case there styled Wesley C. Kelley, respondent, versus Illinois Central Railroad Company, a corporation, appellant, being No. 38,672, in which cause said Supreme Court of Missouri affirmed a judgment entered in the Circuit Court of the City of St. Louis, Missouri, in favor of respondent and against your petitioner herein (R. 178). Said judgment of the Supreme Court of Missouri, Division No. 1, became final on the 7th day of February, 1944, when that Court overruled petitioner's motion to transfer said cause to the Supreme Court of Missouri en banc (R. 205).

OPINION OF THE COURT BELOW.

The said opinion of Division No. 1 of the Supreme Court of Missouri, which petitioner here seeks to have reviewed, has not yet been officially reported, but it appears on pages 179 to 195 of the transcript of the printed record filed herewith, and is reported in 177 S. W. (2) 435.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This suit was instituted by respondent, Wesley C. Kelley, against the petitioner, Illinois Central Railroad Company, in the Circuit Court of the City of St. Louis, Missouri, to recover, under the Federal Employers' Liability Act (45 U. S. C. A., Secs. 51-60), damages resulting from injuries sustained by respondent while in the employ of petitioner as a section hand. Respondent alleged he was violently thrown from a trailer attached to a motor car which, while standing still, was struck and overturned by another motor car on the same track; that both of said motor cars and said trailer were in charge of servants other than respondent and that said collision was caused by the negligence of petitioner.

Petitioner, admitting the employment as alleged, the collision, and some injury to respondent, and denying all other allegations of respondent's petition, set up, as one of its defenses (R. pp. 4-9), that respondent on the 27th day of October, 1942, made a compromise settlement with petitioner of his claim, and executed and delivered to petitioner a full and complete release (which specifically provided that it contained "the entire understanding of the parties") (R. 7), whereby, in consideration of the payment of the sum of $3,500, respondent forever released and discharged petitioner from all damages and causes of action growing out of the injuries sustained by him; that respondent then accepted a draft for $3,500; that an agree-

ment to pay respondent's attorney's fees was contained in a letter from petitioner's agent which was delivered to respondent simultaneously with his delivery of the release to petitioner, together with a stipulation for dismissal of the case (R. pp. 8-9).

In his reply (R. pp. 9-12), respondent alleged that the release was signed and delivered by him conditionally; that the said letter, draft and stipulation were received by respondent with the understanding that the release was not to take effect unless the settlement was approved by one of his attorneys; that said settlement was not so approved, but was disapproved, and that thereupon respondent returned to petitioner the draft, stipulation and letter.

Respondent offered evidence tending to support the allegations of his petition. Parol evidence also tended to support the allegations of respondent's reply that the settlement was conditioned on his attorney's approval.

Petitioner's evidence showed that there was no condition whatever attached to the signing or delivery of the release, which was in writing and recited that it contained the entire understanding of the parties. A fact issue was presented only if the parol evidence, varying the written release, was admissible.

During his opening statement and likewise during his closing argument respondent's counsel made various statements which were objected to by petitioner.

In his opening statement counsel (R. pp. 19-20) told the jury that after the suit had been instituted the claim agent began paying visits to respondent's home and, over objections, added:

> "What I proposed to say was that they knew, as attorneys, that they had no right under the rules of the American Bar Association that govern lawyers throughout the United States, and the rules of the Supreme Court of Missouri to go at any time direct to the client and attempt to negotiate a settlement with him."

(Objection was made to that statement and the Court was asked by counsel for petitioner to tell the jury to disregard it and to strike it from the record. Overruled and exceptions saved.)

There was no evidence whatever that any lawyer attempted to or did negotiate the settlement. Respondent's counsel, in his opening statement of what he expected to prove, referred to remarks which he claimed the evidence would show Heilig (petitioner's claim agent) had made to respondent in negotiating the settlement, to the effect that petitioner was "big and powerful," and to the power and majesty of the railroad (R. 21).

These remarks, though purportedly made to Kelley by Heilig, were never mentioned by Kelley in his testimony. Since they were not followed up by any testimony, it is clear that the references to petitioner as being powerful and to the majesty of the railroad were deliberately intended to influence the jury to the prejudice of petitioner, as they undoubtedly did.

The settlement was made more than a year after the accident, by a claim agent in the presence of respondent's wife and disinterested witnesses.

In his said statement counsel also referred to a woman who had given some information to the claim agent as being a "stool pigeon" (R. pp. 22-23). Referring to the fact that on the day of his visit to respondent's home, after having been there on the preceding evening, the claim agent had been duck hunting in the morning and was still wearing his hunting clothes when he called at plaintiff's home to discuss the settlement again, respondent's counsel said (R. p. 24):

> "He was in his hunting clothes; he was hunting ducks or something that had come into season, and he was out after ducks with a gun and out after Kelley with a pen."

Counsel also referred in his closing argument to the acts of the claim agent as "perpetrating the crime" of settlement. Timely objection was sustained to the single statement about perpetrating a crime (R. p. 156).

The trial resulted in a verdict and judgment for $45,000.00.

Thereafter, an appeal was granted by the Circuit Court to the Supreme Court of Missouri (R. pp. 13-14). Petitioner assigned as error the overruling of its demurrer to the evidence at the close of all the evidence because it appeared from plaintiff's own evidence that a valid written release had been signed and unconditionally delivered by him to petitioner for a valuable consideration; the grossly improper and highly prejudicial remarks of counsel and the excessiveness of the verdict and the judgment.

On December 7, 1943, Division No. 1 of the Supreme Court of Missouri ruled there was evidence to support the submission of the case to the jury on the hypothesis that the respondent had been injured by the negligence of the petitioner as alleged, that the release had been signed and delivered conditionally by respondent as alleged in his reply (though the only evidence tending to prove the condition was parol evidence which contradicted the written release), that his attorney had refused to approve said settlement and therefore the condition on which the release was delivered was not complied with; and held that petitioner was not entitled to a new trial because of any remarks made by counsel.

But the Court held the damages were excessive; that the judgment should be affirmed only on condition that plaintiff enter a remittitur of $15,000 (R. p. 178). Plaintiff entered such a remittitur and the judgment of the Circuit Court was affirmed (R. p. 196).

Thereafter petitioner duly filed its motion for a rehearing (R. 197). On January 3, 1944, petitioner's motion for a rehearing was, by said Division No. 1 of said Supreme Court, overruled (R. 203).

Thereafter petitioner duly filed its motion to transfer said cause to the Court (the Supreme Court of Missouri) en banc, the highest court of the State of Missouri (R. 203).

Thereafter, on the 7th day of February, 1944, petitioner's said motion to transfer said cause from said Division No. 1 of the Supreme Court of Missouri to the Court en banc was, by Division No. 1 of said Supreme Court, overruled (R. 205). Whereupon said Division No. 1 became and was the highest court in the state in which a decision could be had in said cause. By said order the said judgment of said Division No. 1 of the Supreme Court of Missouri in said cause became final.

The duly certified record, including all the proceedings in said cause in said Circuit Court of the City of St. Louis, Missouri, and in said Division No. 1 of said Supreme Court of Missouri, is filed herewith under separate cover.

JURISDICTION OF THIS COURT.

The jurisdiction of this Court is based upon Section 237 of the Judicial Code, as amended and reformulated by the Act of February 13, 1925, C. 229, Sec. 1, 43 Stat. 937, Title 28, U. S. C. A., Sec. 344, providing that it shall be competent for this Court, by certiorari, to require that there be certified to it for review and determination any cause wherein a final judgment or decree has been rendered by the highest court of a state in which a decision could be had wherein a title, right, privilege or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States.

In said cause petitioner specifically set up and claimed a right under a statute of the United States, namely, Employers' Liability Act, 45 U. S. C. A., Sec. 51, Act of April 22, 1908, C. 149, Sec. 8, 35 Stat. 65, and under the decisions of this Court construing such act, which right was denied.

QUESTIONS PRESENTED.

1. The first question presented is whether it was competent for respondent to vary by parol evidence the unconditional written release, which by its express terms contained the entire contract of settlement, i. e., whether it was competent to show by parol evidence that the delivery of the release was conditioned on his attorney's approval. Whether the cause of action under the federal act was released is a question of federal law to be decided by this Court under the terms of the written release. Petitioner contends that parol evidence was incompetent to vary its terms; that the release is good.

2. The second question presented is whether the decision of the Supreme Court of Missouri refusing to grant a new trial on account of the statements of counsel (R. pp. 19, 20, 22, 23, 24, 27, 156) denied to petitioner the right to have a fair trial to which it was entitled under the Federal Employers' Liability Act.

REASONS FOR ALLOWANCE OF THE WRIT.

1. The Supreme Court of Missouri denied petitioner a right set up and claimed under the Federal Employers' Liability Act, namely, the defense that respondent's cause of action under that act was settled and satisfied, i. e., no longer existed. Conceding that respondent once had a valid right of action under the federal act, it was terminated when he signed and delivered a written release which, by its express terms, contained the "entire understanding" between the parties. Parol evidence to prove that the delivery (which is admitted) was conditional, was incompetent and affords no legal basis for avoiding the defense based on the unconditional release. **There was no competent evidence to make this an issue of fact.**

The validity of this defense is a question arising under a federal statute and the final decision rests with this Court.

2. The Supreme Court of Missouri, Division No. 1, by its said decision and judgment in this cause, also denied petitioner a right specially set up and claimed by it under the Federal Employers' Liability Act, namely the right to have the case fairly tried before a jury without venomous oral charges and comments by respondent's attorney in the presence of the jury.

It is submitted that the ruling of the Supreme Court of Missouri in refusing to grant a new trial on account of any or all such grossly prejudicial remarks conflicts with the rulings of this Court relating to the duty of trial courts to protect defendants in damage suits brought under the Federal Employers' Liability Act from the prejudice which such remarks necessarily create in the minds of the jurors—prejudices which cannot be eradicated by merely sustaining objections or telling the jurors to disregard such remarks.

PRAYER.

Wherefore, petitioner prays that a writ of certiorari be issued by this Court directed to the Supreme Court of Missouri to the end that the said opinion and judgment of Division No. 1 of said Supeme Court of Missouri in said cause entitled Wesley C. Kelley, Respondent, versus Illinois Central Railroad Company, a corporation, Appellant, No. 38,672, be reviewed by this Court as provided by law, and that, upon such review, said judgment be reversed, and that petitioner have such other relief as to this Court may seem appropriate.

WM. R. GENTRY,
Attorney for Petitioner.

VERNON W. FOSTER,
CHARLES A. HELSELL,
JOHN W. FREELS,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of Missouri is not yet reported, but appears on pages 179 to 195 of the transcript of the printed record filed herewith, and is reported in 175 S. W. (2) 435.

STATEMENT OF THE CASE.

The essential facts of the case are fully stated in the petition for a writ of certiorari. Reference will be made to such facts where necessary.

SPECIFICATIONS OF ERROR TO BE URGED.

The Supreme Court of Missouri, Division No. 1, in its said opinion in said cause, erred:

1. In denying petitioner its valid defense under the federal act, namely, the defense that respondent's cause of action was fully satisfied by the written release. This written release was not avoided by incompetent parol evidence tending to prove a conditional delivery.

2. In holding that the remarks made by respondent's counsel in the trial court did not prevent petitioner from having a fair trial, and in holding that the petitioner was not entitled to a new trial on account thereof, said remarks being of such inflammatory nature as to implant in the minds of the jurors such deep-seated prejudice against petitioner that it could not have a fair trial under the Act of Congress known as the Federal Employers' Liability Act.

SUMMARY OF THE ARGUMENT.

I.

The Supreme Court of Missouri, Division No. 1, erred in denying petitioner a valid complete defense under the federal act which is fully sustained not only under Missouri decisions (prior to that in this case) but also under the decisions of this Court which, as the question arises under a federal statute, are final.

This question is one of general importance and the decision of the Supreme Court of Missouri departs from the well established and universally followed rule of law.

Gunter v. Standard Oil Co., 60 F. (2d) 389, 391, a decision where both the federal and Missouri decisions are clearly discussed;

Huntington v. Toledo, St. L. & W. R. Co. (C. C. A.), 175 F. 532, 535;

C. A. Smith Lumber & Mfg. Co. v. Parker, 224 F. 347;

Farmers State Bank v. Sloop, 200 S. W. 304-5;

Calloway v. McKnight, 163 S. W. 932, 180 Mo. A. 621;

Robinson v. Kurns, 157 S. W. 790, 794, 250 Mo. 663;

Outcult Advertising Co. v. Barnes, 162 S. W. 631, 632, 176 Mo. A. 307;

Feren v. Epperson Inv. Co., 196 S. W. 435, 436;

Koob v. Ousley, 240 S. W. 102, 105;

General Accident, Fire & Life Ins. Co. v. Owen Bldg. Co., 192 S. W. 145, 146, 195 Mo. A. 371;

Elliott v. Winn, 264 S. W. 391, 393, 305 Mo. 105;

Bank v. Cloverleaf Casualty Co., 233 S. W. 78, 80, 207 Mo. A. 357;

Reigart v. Manufacturers Coal & Coke Co., 117 S. W. 61, 67, 217 Mo. 142;

J. B. Colt Co. v. Gregor, 44 S. W. (2d) 2, 328 Mo. 1216;

Shaffner v. Moore Shoe Co., 3 S. W. (2d) 263, 264;

State v. Grinstead, 282 S. W. 715, 721, 314 Mo. 55;

Murphy v. Holliway, 16 S. W. (2d) 107, 114, 223 Mo. A. 714;
Ocean Accident & G. Corp. v. Missouri Engineering & C. Co., 63 S. W. (2d) 196, 199;
St. Louis Basket & Box Co. v. Mastin, 79 S. W. (2d) 493, 495;
St. Louis Iron Mountain Ry. v. Taylor, 210 U. S. 281, 293;
Kansas City So. Ry. v. Albers Comm. Co., 223 U. S. 573, 591;
Seaboard Air Line Ry. v. Duvall, 225 U. S. 477, 488;
St. L. & Iron Mtn. Ry. v. McWhirter, 229 U. S. 265, 281;
Seaboard Air Line v. Padgett, 236 U. S. 668, 671;
C. M. & St. P. Ry. v. Coogan, 271 U. S. 472, 474;
Patton v. Atchison, T. & S. F. Ry. Co., 158 Pac. 576, 578;
Moore v. C. & O. Ry. Co., 291 U. S. 205, 214;
Brawley v. U. S., 96 U. S. 168;
Simpson v. U. S., 172 U. S. 372;
Richardson v. Hardwick, 106 U. S. 252;
Hawkins v. U. S., 96 U. S. 689;
Interurban Construction Co. v. Hays, 191 Mo. 248;
Wishart v. Gerhart, 105 Mo. App. 112;
Boswell v. Richards, 224 S. W. 1031.

Uniformity in the interpretation of the federal act extends to the type of proof necessary for judgment.

Garrett v. Moore-McCormack, 317 U. S. 239, 244;
New Orleans & N. E. R. Co. v. Harris, 247 U. S. 367, 371.

II.

The Court also erred in not holding that improper remarks made by counsel for the respondent, both in his opening statement to the jury and in his closing argument, were so prejudicial as to prevent the petitioner from having a fair and impartial trial by jury.

In a case arising under the Federal Employers' Liability Act, as in other cases, this Court has held that prejudicial remarks made in the presence of a jury ought to be condemned by appellate courts and a new trial ought to be granted in cases where the offense was less prejudicial than in the present instance.

N. Y. Central R. R. Co. v. Johnson, 227 U. S. 448, 49 Sup. Ct. Rep. 300;

M. St. P. & S. S. M. Ry. Co. v. Moquin, 283 U. S. 520, 51 Sup. Ct. Rep. 501.

ARGUMENT.

I.

The record discloses that the action is one under the Federal Employers' Liability Act of April 22, 1908, 45 U. S. C. A., Section 51, Chapter 149, Section 1, 35 Stat. 65. The question is purely one of law. If, as we contend, parol evidence was inadmissible to vary the terms of the written release, complete in itself, there was no issue of fact for a jury to decide.

The right claimed is a federal one arising under an act of Congress and therefore the decisions of this Court, not those of any state, are final. Petitioner's contention is plain and certain. It is simply this: that respondent's right of action was legally settled and finally satisfied by a valid release which he signed and delivered in consideration of the payment to him of a substantial sum which was entirely satisfactory and which he had a full and complete legal right to accept.

The sole ground for avoiding the release, which respondent signed and delivered, is that the delivery was conditional, that the settlement was conditioned on the approval of his lawyer. This afterthought came too late.

If the written release was to be made conditional, the place for the condition was in the release itself, not in his mind. Respondent, a mentally competent mature man, who had waited more than a year after the accident to settle his claim, signed and delivered a written release which specifically provided that it contained "the entire understanding" of the parties (R. p. 94, Ex. 1). He could not legally avoid it by offering incompetent parol evidence to vary it.

The rule of law is unquestioned and its application universal.

(a) That the uniform interpretation of the Federal Employers' Liability Act is a federal question for this Court finally to decide has been repeatedly held by this and the state courts. This uniformity of interpretation includes the sufficiency of proof to establish either the cause of action or the defense. In **St. Louis, I. M. & S. R. Co. v. Taylor**, 210 U. S. 281, this Court said at page 293:

> "* * * Where a party to litigation in a state court insists, by way of objection to or requests for instructions, upon a construction of a statute of the United States which will lead, or, on possible findings of fact from the evidence may lead, to a judgment in his favor, and his claim in this respect, being duly set up, is denied by the highest court of the state, then the question thus raised may be reviewed in this court. The plain reason is that, in all such cases, he has claimed in the state court a right or immunity under a law of the United States and it has been denied to him. Jurisdiction so clearly warranted by the Constitution and so explicitly conferred by the act of Congress needs no justification. But it may not be out of place to say that in no other manner can a uniform construction of the statute laws of the United States be secured, so that they shall have the same meaning and effect in all the states of the Union."

In the case of **Kansas City So. Ry. v. Albers Comm. Co.**, 223 U. S. 573, the Court in stating the rule said at page 591:

> "The second ground has more color, but is also untenable. While it is true that upon a writ of error to a state court we cannot review its decision upon pure questions of fact, but only upon questions of law bearing upon the Federal right set up by the unsuccessful party, it equally is true that we may examine the entire record, including the evidence, if properly incorporated therein, to determine whether what pur-

ports to be a finding upon questions of fact is so involved with and dependent upon such questions of law as to be in substance and effect a decision of the latter. That this is so is amply shown by our prior rulings. Thus in **Mackay v. Dillon**, 4 How. 421, 447, where the state courts had given to certain evidence an effect claimed to be unwarranted by an applicable law of Congress, it was held that their decision 'on the effect of such evidence may be fully considered here.' In **Dower v. Richards**, 151 U. S. 658, 667, where the conclusiveness of findings of fact by a state court was elaborately considered, it was recognized that where the question is 'of the competency and legal effect of the evidence as bearing upon a question of Federal law the decision may be reviewed by this court.' "

In **Garrett v. Moore-McCormack Co.**, 317 U. S. 239, 244, the rule is stated:

> "This Court has specifically held that the Jones Act is to have a uniform application throughout the country, unaffected by 'local views of common law rules.' **Panama R. Co. v. Johnson**, 264 U. S. 375, 392. The Act is based upon, and incorporates by reference, the Federal Employers' Liability Act, which also requires uniform interpretation. **Second Employers' Liability Cases**, 223 U. S. 1, 55 et seq. This uniformity requirement extends to the type of proof necessary for judgment. **New Orleans & Northeastern R. Co. v. Harris**, 247 U. S. 367."

Of the many other cases directly in point, citation of but a few suffice.

Seaboard Air Line Ry. v. Duvall, 225 U. S. 477, 485;
St. L. & Iron Mtn. Ry. v. McWhirter, 229 U. S. 265, 275;
Seaboard Air Line v. Padgett, 236 U. S. 668, 671;
C. M. & St. P. Ry. v. Coogan, 271 U. S. 472, 474;

Moore v. C. & O. Ry. Co., 291 U. S. 205, 214;
Patton v. Atchison, T. & S. F. Ry. Co., 158 Pac. 576 (Okl. 1916), involving, as here, a release.

(b) That the question is one involving the proper interpretation of the federal law cannot be doubted. That a written release which expressly provides that it contains the entire understanding of the parties cannot be avoided by parol evidence which adds a condition not found in the release itself, is a rule of law universal in its application.

In **Gunter v. Standard Oil Co.**, 60 F. (2d) 389, the Circuit Court of Appeals for the Eighth Circuit said at page 391:

> "One of the main contentions of appellant is that the court erred in holding that the written instrument of release precluded proof of the alleged oral contract. Reliance is placed by appellant upon section 954, Revised Statutes of Missouri 1929 (Mo. St. Ann., Sec. 954), which reads as follows: 'Whenever a specialty or other written contract for the payment of money, or the delivery of property, or for the performance of a duty, shall be the foundation of an action or defense in whole or in part, or shall be given in evidence in any court without being pleaded, the proper party may prove the want or failure of the consideration, in whole or in part, of such specialty or other written contract.'
>
> "We do not think the statute has the effect claimed for it by appellant. The statute was intended to allow a party to show a want or failure in whole or in part of the consideration of a specialty or other written contract when such instrument was being used in evidence against him."
>
> * * * * * * *
>
> "We think the Missouri statute did not change the rule that parol evidence will not be allowed to contradict, add to, or vary a written contract, absent fraud,

accident, or mistake, with perhaps an exception in the case of notes and due bills. The following cases from the courts of Missouri are in point:

Interurban Construction Co. v. Hayes, 191 Mo. 248, 291, 89 S. W. 927, 939;
Wishart v. Gerhart, 105 Mo. App. 112, 116, 78 S. W. 1094;
Boswell v. Richards, 224 S. W. 1031, 1032."

In **Huntington v. Toledo, St. L. & W. R. Co.**, 175 F. 532, plaintiff attempted to add to the written release by parol evidence tending to show a promise to employ. The Court said at page 535:

"It is manifest that this instrument is not a mere receipt. It is contractual in form and substance. On its face it is explicit and apparently complete. Its language is in no particular suggestive of omission. Indeed, it required the offer of oral testimony to disclose any idea of omission. * * *

"It is claimed in argument that evidence of a promise to employ only affects and was intended only to affect the consideration mentioned in the agreement, and that, like the admission of payment or amount expressed in any ordinary receipt or deed, it may be explained by parol evidence. But the difficulty of applying the rule thus suggested to the present instrument is that, under the testimony offered, it would in terms introduce into the agreement covenants creating (aside from any question under the statute of frauds) new and important legal relations between the parties on the very subject of settlement contained in the written agreement.

"Similar holdings were made in St. Louis & S. F. Ry. Co. v. Dearborn (C. C. A.), 60 F. 880; Holbrook etc. Corp. v. Sperling (C. C. A.), 239 F. 715; E. I. Du Pont de Nemours & Co. v. Kelly (C. C. A.), 252 F. 523, 525; In re Atwater (C. C. A.), 266 F. 278, 281."

Likewise in **C. A. Smith Lumber & Mfg. Co. v. Parker,** 224 F. 347, the plaintiff attempted to vary the written release by parol evidence that he was promised continual employment. The Court said, at page 351:

> "To hold that such an instrument, executed under such circumstances and for such a purpose, is not contractual in its nature, would be, in our opinion, a clear violation of its unambiguous language. Similar releases, few, if any, of which were stronger in terms, and some not so strong, were held contractual in their nature, and therefore no more to be disputed or controlled by parol evidence than any other instrument in writing witnessing an agreement of the parties, in the cases of St. Louis & S. F. Ry. Co. v. Dearborn, 60 Fed. 880, 9 C. C. A. 286 (there follows a long list of authorities)."

In **Brawley v. United States,** 96 U. S. 168, the Court said, at page 173:

> "All this is irrelevant matter. The written contract merged all previous negotiations, and is presumed, in law, to express the final understanding of the parties. If the contract did not express the true agreement, it was the claimant's folly to have signed it. The Court cannot be governed by any such outside considerations. Previous and contemporary transactions and facts may be very properly taken into consideration to ascertain the subject matter of a contract, and the sense in which the parties may have used particular terms, but not to alter or modify the plain language which they have used."

Further discussion of the authorities is unnecessary. The following are but a few of the innumerable decisions supporting our contention:

Simpson v. United States, 172 U. S. 372, 379;
Richardson v. Hardwick, 106 U. S. 252, 254;
Hawkins v. United States, 96 U. S. 689, 697.

If respondent actually had in mind at the time he executed and delivered the written release, that its delivery was to be conditioned on his attorney's approval, it was his legal duty to see that such condition was incorporated in the written contract which he agreed contained the entire understanding between him and the company. The law does not permit him to substitute an alleged or pretended oral understanding for the written contract, complete in itself, which he admittedly signed and delivered. It is unthinkable that a settlement, evidenced by written release (no fraud being claimed), later can be avoided simply by the claim of one party that it was made subject to the approval of some third person.

II.

Counsel for respondent said in his opening statement:

> "Well, shortly after he (plaintiff) engaged counsel, the claim agent then began paying visits to the man's home. As a matter of fact, I think the evidence will show that once attorneys are engaged in a case, that under the rules of the Supreme Court of Missouri, and under the rules that govern lawyers' conduct throughout the whole United States—" (R. 19).

(Objections made in anticipation that continuation would follow allegations in the reply overruled.) Counsel continued:

> "What I proposed to say was that they knew as attorneys that they had no right under the rules of the Bar Association—American Bar Association—that governed lawyers throughout the United States, and the rules of the Supreme Court of Missouri, to go at any time direct to the client and attempt to negotiate with him by settlement" (R. 19).

(Objection made and overruled.)

Counsel then said:

> "And for the reason I think the evidence will show you gentlemen—we expect to show you that for that reason that an attorney who would do that would be subject to discipline; that they had a man who is not an attorney, Heilig, who is not admitted to the Bar—they had him go out to see this man, because not being a member of the Bar he could go ahead and do the job, so they thought, without being disciplined, that is to say without being thrown out of the American Bar Association or something of that kind" (R. 20).

(Objection overruled.)

Counsel continued:

> "This Heilig, he had a woman by the name of Artz. I think she is in the court room too. She is the wife of another employe who had been injured and Artz was in the same hospital with Mr. Kelley. They lived near the Kelleys in the same neighborhood. They were not friendly with the Kelleys; that is, not intimate neighbors or intimate friends; so when he (Heilig) couldn't come he would send the Artz woman over to find out how things were going, and the Artz woman would come over and sit down and talk and being the stool pigeon for the railroad company—" (R. 22).

(Objections overruled.)

Counsel said that Mrs. Artz reported to Heilig that it was "the time to make the kill" (R. 23).

Counsel also said, referring to the claim agent:

> "He was in his hunting clothes; he was hunting ducks or something that had come into season, and he was out after ducks with a gun and out after Kelley with a pen" (R. 24).

In his closing argument counsel said, while attempting to defend his 50 per cent contingent fee contract (R. 156):

> "When did he (counsel for defendant) learn of the 50% contract? He wasn't going to take part in it he said. That's a phony statement because his own claim agent says he learned of the 50% contract the night he tried to perpetrate the crime" (R. 172).

(Objection to the statement "He tried to perpetrate the crime" was sustained, the only objection sustained to any part of the argument.)

The reference to the rules of the American Bar Association and the successful effort to poison the minds of the jurors against counsel for the company was particularly offensive and unjustifiable because, as the record discloses, the settlement negotiations were conducted by a claim agent and not by attorneys for the company. There was no occasion whatever to refer to the rules of the American Bar Association or the ethics of the legal profession. The parties had an unquestioned legal right to settle the alleged cause of action. Settlement was not made until more than one year after the accident. The negotiations continued over a period of two days time and the settlement was concluded in the presence of disinterested witnesses (R. 47, 107, 142).

The attack on the lawyers was wholly unwarranted. That it succeeded in inflaming the minds of the jurors is shown by the fact that the Supreme Court of Missouri found it necessary to reduce the excessive verdict by $15,000. If, as is apparent, the verdict was excessive, the remittitur could not cure the error.

In **N. Y. C. R. R. Co. v. Johnson**, 49 Sup. Ct. Rep. 300, 279 U. S. 310, this Court directed that the argument be limited to the question whether the alleged misconduct of counsel for the plaintiffs in their arguments to the jury was so unfairly prejudicial to the defendant as to justify a new trial. This Court held that it was, and in doing so said, at pages 303, 304 of Supreme Court Reporter (pp. 317-319 of 279 U. S.):

"In this condition of the record, the repeated statements of counsel that syphilis was the defense, coupled with the vituperative language which we have quoted and the statements that the petitioner had charged respondents with indecency, made in the face of testimony of respondents' own witness that the disease was frequently transmitted by the use of drinking cups or other innocent means, was not fair comment on the evidence or justified by the record. Cf. Cherry Creek Nat. Bank v. Fidelity & Casualty Co., 207 App. Div. 787, 202 N. Y. S. 611; Grabowsky v. Baumgart, 128 Mich. 267, 272, 87 N. W. 891; Fisher v. Weinholzer, 91 Minn. 22, 25, 97 N. W. 426; Strudgeon v. Village of Sand Beach, 107 Mich. 496, 504, 65 N. W. 616. Their obvious purpose and effect were improperly to influence the verdict by their appeal to passion and prejudice.

"However ill-advised, counsel for petitioner was within his rights in following this line of inquiry, and, even if it be assumed that the situation was one calling for comment on the evidence so elicited, neither petitioner nor its counsel was on trial for pursuing it. Want of good judgment or good taste, or even misconduct on the part of either, was not an issue in the case for the jury, nor could it excuse like conduct on the part of respondents' counsel. See Tucker v. Henniker, 41 N. H. 317, 322; Mittleman v. Bartikowsky, 283 Pa. 485, 488, 129 A. 566; Mitchum v. State of Georgia, 11 Ga. 615, 629; Welch v. Union Central Life Ins. Co., 117 Iowa 394, 404, 90 N. W. 828. An exhibition of any or all of these faults was not ground for a verdict in respondents' favor or for enhancing it.

"Such a bitter and passionate attack on petitioner's conduct of the case, under circumstances tending to stir the resentment and arouse the prejudice of the jury, should have been promptly suppressed. See Masterson v. Chicago & N. W. Ry. Co., 102 Wis. 571, 574, 78 N. W. 757; Gulf, Colorado & S. F. Ry. Co. v. Butcher, 83 Tex. 309, 316, 18 S. W. 583; Tucker v. Henniker, supra, at page 322 of 41 N. H.; Monroe v. Chicago & Alton R. Co., 297 Mo. 633, 644, 249 S. W. 644, 257 S. W. 469. The failure of the trial judge to

sustain petitioner's objection or otherwise to make certain that the jury would disregard the appeal could only have left them with the impression that they might properly be influenced by it in rendering their verdict, and thus its prejudicial effect was enhanced. See Hall v. United States, 150 U. S. 76, 81, 14 S. Ct. 22 (37 L. Ed. 1003); Graves v. United States, 150 U. S. 118, 121, 14 S. Ct. 40 (37 L. Ed. 1021); Wilson v. United States, 149 U. S. 60, 68, 13 S. Ct. 765 (37 L. Ed. 650). That the quoted remarks of respondents' counsel so plainly tended to excite prejudice as to be ground for reversal, is, we think, not open to argument. The judgments must be reversed, with instructions to grant a new trial.

"Respondents urge that the objections were not sufficiently specific to justify a reversal. But a trial in court is never, as respondents in their brief argue this one was, 'purely a private controversy * * * of no importance to the public.' The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence. The public interest requires that the court of its own motion as is its power and duty, protect suitors in their right to a verdict, uninfluenced by the appeals of counsel to passion or prejudice. See Union Pac. R. R. Co. v. Field (C. C. A.), 137 F. 14, 15; Brown v. Swineford, 44 Wis. 282, 293, (28 Am. Rep. 582). Where such paramount considerations are involved, the failure of counsel to particularize an exception will not preclude this court from correcting the error. Brasfield v. United States, 272 U. S. 448, 450, 47 S. Ct. 135 (71 L. Ed. 345).

"As there must be a new trial, attention should be directed to other objectionable conduct by respondents' counsel in the course of the trial: their repeated assertion, without supporting evidence, that the defense was a 'claim agent defense'; references to petitioner as an 'eastern railroad'; and statements that the railroad had 'come into this town' and that witnesses and records had been 'sent on from New York'

> for the trial of the cause. Such remarks of counsel, and others of similar character, all tending to create an atmosphere of hostility toward petitioner as a railroad corporation located in another section of the country have been so often condemned as an appeal to sectional or local prejudice as to require no comment. See Cherry Creek Nat. Bank v. Fidelity & Casualty Co., supra; Dolph v. Lake Shore etc. R. Co., 149 Mich. 278, 280, 112 N. W. 981; Southern R. Co. v. Simmons, 105 Va. 651, 665, 55 S. E. 459."

In the case of **M. St. P. & S. S. M. Ry. Co. v. Moquin**, 283 U. S. 520, 51 Sup. Ct. Rep. 501, this Court, in a very brief opinion, decided a case under the following circumstances: The plaintiff had been injured in the course of his employment in interstate commerce, sued under the Federal Employers' Liability Act and obtained a large verdict. Complaint was made because of alleged misconduct of plaintiff's counsel in making appeals to passion and prejudice, and the railroad moved to set aside the verdict on that ground. The Supreme Court of Minnesota, on appeal, had held that the verdict was excessive because of passion and prejudice and ordered a new trial unless the plaintiff would remit a portion of the judgment, which plaintiff did. This Court granted a writ of certiorari, limited to the question arising from the failure of the state court to grant a new trial in a case under the Federal Employers' Liability Act where the verdict was obtained by appeals to passion and prejudice.

This Court held that a new trial should have been granted, and in so holding said, at page 502 of 51 Sup. Ct. Rep. (pp. 521-522 of 283 U. S.):

> "It is unnecessary to cite from the record what occurred at the trial, or to discuss the propriety of the views of the court below as to the basis of the verdict. The finding is quoted above, and our sole concern is as to the action it requires. Nor need we inquire into the rules applicable in trials under state law. Whether

under the state's jurisprudence the present record would entitle petitioner to a new trial or to such a conditional order as was awarded is immaterial.

"In actions under the federal statute no verdict can be permitted to stand which is found to be in any degree the result of appeals to passion and prejudice. Obviously such means may be quite as effective to beget a wholly wrong verdict as to produce an excessive one. A litigant gaining a verdict thereby will not be permitted the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent."

This Court scarcely needs to be told that the average juror has at the outset sufficient prejudice against a corporate defendant and sufficient sympathy for an injured employee to make wholly unnecessary and inexcusable attempts to secure excessive verdicts by inflammatory argument.

It is respectfully submitted by petitioner that the writ of certiorari herein prayed for ought to be issued. Petitioner prays this Court to issue the writ; to reverse the judgment of the Supreme Court of Missouri; to sustain the written release of the cause of action, and in the alternative to order that a new trial be granted.

Respectfully submitted,

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(13)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

No. 819.

ILLINOIS CENTRAL RAILROAD COMPANY,
a Corporation,
Petitioner,

v.

WESLEY C. KELLEY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INDEX.

Cases Cited.

Textbooks Cited.

Statutes Cited.

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STATEMENT.

The summary statement of petitioner is deemed by respondent to be inaccurate and somewhat misleading, and respondent will, therefore, undertake to make a statement of his own.

Respondent, Wesley C. Kelley, as plaintiff, brought this suit against petitioner Railroad Company, as defendant, in the Circuit Court of the City of St. Louis, Missouri, to recover damages under the Federal Employers' Liability Act (April 22, 1908, c. 149, 35 Stat. 65, as amended; 45 USCA, §§ 51-60), for personal injuries sustained by him on September 17, 1941, while he was in the employ of petitioner as a section hand engaged in interstate commerce

and transportation, and engaged in the course and scope of his employment in repairing petitioner's interstate main line track. He was injured when violently thrown from a motor car on which he was riding when it was derailed as a result of being driven into collision with the trailer of another car on the same track, which was then stationary, but which had been moving in the same direction prior to its being stopped. The two motor cars were in the charge of, and being operated by, agents and servants of petitioner other than respondent.

The facts recited in the foregoing paragraph were alleged in respondent's petition which was filed on February 3, 1942 (R. 1-4), were admitted in petitioner's amended answer which was filed on December 2, 1942 (R. 4-5), were shown in evidence by respondent's undisputed oral testimony (R. 41-42) and were also contained in a stipulation of the parties read into evidence (R. 88-91). The petitioner Railroad Company makes no contention that such facts were insufficient to establish petitioner's liability for respondent's injury by reason of such injury having resulted from negligence on the part of petitioner as charged in respondent's petition.

By its amended answer (R. 4-9) petitioner pleaded, as an affirmative defense: that, on October 27, 1942, respondent made a compromise settlement of his claim through petitioner's claim agent, L. L. Heilig, and executed and delivered to petitioner a full and complete release, in consideration of the payment to respondent of the sum of $3,500, whereby respondent forever released and discharged petitioner from any and all claims, demands and causes of action on account of said injury; that payment of said sum of $3,500 was made by a valid draft for that amount executed and delivered to respondent by petitioner's said claim agent, and accepted by respondent; and that, as a further consideration and inducement to respondent to make the compromise settlement, petitioner

agreed in a writing, delivered to respondent coincident with the delivery of the release, to pay any attorneys' fees for which respondent had become obligated on account of his injury and suit; and that, also coincident with the execution and delivery of the release, respondent and petitioner, through its said claim agent, Heilig, executed a stipulation for the dismissal of this suit on account of respondent's injuries. The release was copied *in haec verba* in petitioner's said answer (R. 6-7), and a photostatic copy of it appears opposite page 94 of the printed record herein (R. 94).

In his reply executed under oath and filed on December 7, 1942 (R. 9-13), respondent denied the allegations of petitioner's said answer, and alleged: that, long prior to the date of the alleged compromise settlement of respondent's claim, respondent was represented in his claim by two attorneys who had brought this suit, and petitioner had been summoned and had answered in said suit through its attorneys; that, in order to circumvent the canons of ethics of the American Bar Association, making it unethical for a lawyer to deal directly with another party represented by counsel, and a rule of the Supreme Court of Missouri incorporating said canons as a rule of said Court, petitioner had its claim agent, Heilig, who was not a lawyer, attempt to negotiate a settlement and compromise of respondent's claim in the absence of his attorneys and without their knowledge or consent, but respondent refused to deal with petitioner unless at least one of his attorneys was present; and that, upon learning this latter fact, petitioner's claim agent, on October 27, 1942, tricked and induced respondent into going into the office of counsel for petitioner, by falsely representing that one of respondent's attorneys, Asa J. Wilbourn, would come to that office and be present at the time of the proposed negotiations for settlement. Respondent's reply then goes on to allege (R. 11-12):

"* * * that, while plaintiff was in said office on said occasion, the defendant produced the form of release referred to in defendant's answer herein, and various other papers, to be executed by plaintiff in connection with a proposed settlement of plaintiff's said claim and suit, and obtained plaintiff's signature to said release and other papers, and delivery thereof to defendant, *upon the condition* that said release and other papers would be of no force or effect unless plaintiff's said attorney of record, Asa J. Wilbourn, *approved* the aforesaid proposed settlement of plaintiff's said claim and suit; and that, upon the aforesaid *conditional signing and delivery* of said release and other papers by plaintiff, as aforesaid, defendant delivered to plaintiff a certain draft, payable to the order of plaintiff, in the sum of $3,500.00, *upon condition* that, if plaintiff's said attorney of record, Asa J. Wilbourn, did not approve the aforesaid proposed settlement of plaintiff's said claim and suit, said draft was to be of no force and effect.

"Further replying, plaintiff states that, as soon as was reasonably practicable thereafter, and on, to wit, the 28th day of October, 1942, plaintiff communicated with his said attorney of record, Asa J. Wilbourn, and sought the approval or disapproval by said Wilbourn of the aforesaid proposed settlement of plaintiff's said claim and suit; that plaintiff's said attorney of record, Asa J. Wilbourn, immediately and emphatically disapproved said proposed settlement of plaintiff's said suit and claim; and that, within a reasonable time thereafter, plaintiff, by registered mail, duly informed defendant that the proposed settlement of plaintiff's said claim and suit had been disapproved, and duly returned to defendant the draft hereinbefore mentioned and all other papers left with plaintiff in connection with the aforementioned proposed settlement of plaintiff's said claim and suit.

"* * * that plaintiff did not endorse said draft, or attempt to cash the same, or receive any benefit thereunder; and that, by reason of all the facts and circumstances aforesaid, the said release referred to in de-

fendant's amended answer herein was not executed or delivered by plaintiff, and is null, void and of no force or effect because wholly lacking in consideration, and *because the same never went into effect by reason of its having been signed and delivered by plaintiff upon a condition which has not occurred.*" (Emphasis supplied.)

Respondent's testimony at the trial fully supported the allegations of his reply as to the circumstances under which he went to the office of petitioner's counsel (R. 47-48, 66-67), and to the effect that his signing and delivery of the release, and his acceptance of the $3,500 draft, were conditioned upon the approval of the proposed settlement by his attorney, Mr. Wilbourn (R. 46-50, 63, 69, 70-71, 72, 73-74). Respondent's testimony further showed that he signed and delivered those documents very reluctantly, even upon that condition, and only after several hours in the office of petitioner's counsel (R. 63-64, 67, 79, 129), during which time he attempted to communicate with Mr. Wilbourn, but was unable to do so (R. 48-49). Respondent's testimony in these respects is ably epitomized in the opinion of the Supreme Court of Missouri (R. 181-182; 177 S. W. 2d, l. c. 437-438), and was fully corroborated by the testimony of his wife, who was at all times present (R. 79-80, 82).

The evidence showed without dispute—in fact, it was conceded—that both Mr. Wilbourn, and respondent's other attorney, Mr. Eagleton, emphatically disapproved the proposed settlement of respondent's claim immediately upon learning of it the day after respondent had been in the office of petitioner's counsel (R. 54, 63, 81, 86-87); that the draft for $3,500 was never endorsed or cashed (R. 52, 141); and that the draft and other documents delivered to respondent at the office of petitioner's counsel were returned to petitioner by respondent's counsel by registered mail as soon as possible after respondent's counsel learned of, and disapproved, the proposed settlement (R. 54-55, 57).

The testimony offered on behalf of petitioner contradicted that of respondent in many respects, and tended to show that the signing and delivery of the release by respondent were unconditional (R. 100-101, 120-121, 145). Petitioner's claim agent, Heilig, testified that, some eight months before he secured the release from respondent, he (Heilig) knew that respondent had employed attorneys to represent him in his claim (R. 109-110), and that they had filed suit thereon (R. 112); and that the respondent was the one who proposed the making of a settlement of his claim for $3,500 (R. 111-114) direct with Heilig and without the knowledge or consent of respondent's attorneys (R. 129). However, on cross-examination, Heilig testified that, about a week before he obtained the release from respondent, he (Heilig) had received from his superiors specific orders to effect a direct settlement with respondent, in the absence and without the knowledge of respondent's attorneys (R. 124), and that, at the time he (Heilig) took respondent to the office of petitioner's counsel for that purpose, respondent, upon finding that his attorney, Mr. Wilbourn, was not there, attempted to reach Mr. Wilbourn by telephone, but was unable to do so (R. 129-131).

Evidence was adduced by petitioner showing that respondent had a contract of employment with his attorneys whereby the attorneys were to receive 50 per cent of any amount recovered by respondent on account of his injuries (R. 64-65, 66, 91-93, 147-148).

The trial resulted in a verdict and judgment in favor of respondent and against petitioner in the sum of $45,000 (R. 13, 157) and petitioner duly appealed to the Supreme Court of Missouri (R. 157-177), where, on December 6, 1943, the judgment was affirmed upon condition that respondent enter a remittitur of $15,000 (R. 178, 192), which remittitur, reducing respondent's judgment to $30,000, was duly entered on December 13, 1943 (R. 193-194).

Opinions of the Courts Below.

There was no opinion of the trial court in the case here sought to be reviewed.

The opinion of the Supreme Court of the State of Missouri appears at pages 178-192, inclusive, of the printed transcript of the record herein, and is reported as *Kelley v. Illinois Central R. Co.*, 177 S. W. 2d 435. The case is not yet reported in the official Missouri Reports.

In its opinion, the Supreme Court of Missouri ruled, in substance and effect, that one of the essential elements of a binding and enforceable written contract is a delivery of the written instrument evidencing the contract; that a delivery on condition is not a complete delivery, and a contract delivered on condition is not effective, until the condition is fulfilled; that parol evidence is admissible to show conditions precedent, which relate to the delivery or taking effect of the instrument, for this is not an oral contradiction or variation of the written instrument, but goes to the very existence of the contract and tends to show that no valid or effective contract ever existed; and that, accordingly, the evidence in this case made an issue for the jury as to the existence and binding effect of the release set up in petitioner's answer as an affirmative defense to respondent's cause of action (R. 184-185; 177 S. W. 2d, l. c. 439-440).

The opinion of the Supreme Court of Missouri also passed upon some allegedly prejudicial statements made by respondent's counsel in his opening statement and in his argument to the jury (which we shall hereinafter consider in more detail in our argument herein), and held that such statements did not constitute prejudicial or reversible error (R. 186-190; 177 S. W. 2d, l. c. 440-442).

The opinion of the Supreme Court of Missouri also passed upon alleged excessiveness of the verdict and judgment, ruled that the verdict and judgment were excessive

by $15,000 when compared with verdicts and judgments in other cases involving similar injuries, and, accordingly, ordered the remittitur of $15,000 (R. 190-192; 177 S. W. 2d, l. c. 442-443).

Questions Presented.

The questions presented here are whether the Supreme Court of Missouri erred in its rulings respecting:

(1) The validity and effectiveness of the release set up by petitioner as an affirmative defense, and

(2) The nonprejudicial effect of the statements made by respondent's counsel in his opening statement and in his argument to the jury.

SUMMARY OF THE ARGUMENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

I.

There was no error in the ruling that a submissible issue was made for the jury as to whether the release pleaded as an affirmative defense was an existing and effective contract, because:

(a) If, as respondent's evidence showed, the release was signed and delivered by respondent upon condition that the proposed settlement of his claim and suit be approved by his attorney, Asa J. Wilbourn, the release never became effective, and constituted no defense to plaintiff's claim or action, because the proposed settlement was disapproved by Mr. Wilbourn.

13 Corpus Juris, p. 307, § 131;
17 Corpus Juris Secundum, p. 414, § 64;
Ware v. Allen, 128 U. S. 509, 9 S. Ct. 174, 32 L. Ed. 563;
Burke v. Dulaney, 153 U. S. 228, 14 S. Ct. 816, 38 L. Ed. 698;
Mankin v. Bartley, 4 Cir., 277 F. 960;
National Bank of Ky. v. Louisville Trust Co., 6 Cir., 69 F. 2d 97;
American Surety Co. of N. Y. v. Egan, 6 Cir., 62 F. 2d 223;
Meredith v. Brock, 322 Mo. 869, 17 S. W. 2d 345;
Pevesdorf v. Union Electric Co., 333 Mo. 1155, 64 S. W. 2d 939;
Stiebel v. Grossberg, 202 N. Y. 266, 95 N. E. 692;
Halloran v. Fischer, 126 Conn. 44, 9 A. 2d 290;
Carr v. Weiss, 215 Mass. 532, 102 N. E. 906;
Jordan v. Davis, 108 Ill. 336;
Kilcoin v. Ortell, 302 Ill. 531, 135 N. E. 16;
Handley v. Drum, 237 Ill. App. 587;
Tegtmeyer v. Nordlund, 259 Ill. App. 247.

(b) Parol evidence was admissible to show conditions precedent, which related to the delivery or taking effect of the release, for this was not an oral contradiction or variation of the instrument but went to the very existence of the contract and tended to show that no valid and effective contract ever existed.

32 Corpus Juris Secundum, p. 857, § 935;
Authorities cited under point I (a), supra.

(c) The language of the release to the effect that it "contains the entire understanding," related only to the subject matter of the instrument—particularly, the consideration for the release—and had nothing whatsoever to do with the matter of delivery *vel non* of the instrument.

II.

There was no prejudicial and reversible error in the opening statement or the argument made by respondent's counsel during the trial, and the Supreme Court of Missouri correctly so ruled, because:

(A) Technical errors, defects or exceptions which did not affect the substantial rights of the parties must be disregarded, and prejudicial error will not be preserved.

Act of Feb. 26, 1919, c. 48, 40 Stat. 1181, 28 U. S. C. A. 391;
Revised Statutes of Missouri 1939, § 1228;
Sebastian Bridge District v. Missouri Pacific R. Co., 8 Cir., 292 F. 345, 349;
Morgan v. Sun Oil Co., 5 Cir., 109 F. 2d 179, 181.

(B) Respondent's counsel had the right, in his opening statement to the jury, to state in good faith his claims as to the law and the available evidence upon the pleaded issues, and the trial court had a broad discretion in ruling upon that opening statement. There is nothing in the record in this case to show bad faith on the part of re-

spondent's counsel, or abuse of the trial court's discretion, in this connection. On the contrary, the evidence adduced was substantially what respondent's counsel stated that it would be, and any improper statements of counsel were prevented from being prejudicial by the rulings of the trial court.

Buck v. St. Louis Union Trust Co., 267 Mo. 644, 185 S. W. 208, 212;
F. L. Dittmeier Real Estate Co. v. Southern Surety Co. (Mo. Sup.), 289 S. W. 877, 888;
State ex rel. Kansas City Public Service Co. v. Shain, 345 Mo. 543, 134 S. W. 2d 58, 61;
Thompson v. St. Louis S. W. R. Co. (Mo. Sup.), 183 S. W. 631, 636;
Dees v. Skrainka Const. Co. (Mo. Sup.), 8 S. W. 2d 873, 878;
Ocean Accident & Guarantee Co. v. Penick & Ford, 8 Cir., 101 F. 2d 493, 500;
Graham v. United States, 231 U. S. 474, 34 S. Ct. 148, 151-152, 58 L. Ed. 319.

(C) The arguments of counsel to the jury not having been preserved in full, and only fragments of the argument of respondent's counsel being shown in the record, there is no way of determining that such argument was not invited and responsive to the whole record. To rule prejudicial the argument of respondent's counsel—that a statement made by one of petitioner's counsel was "phony" (R. 172), and which manifestly was made in response to an argument made by such one of petitioner's counsel—would be to convict the respondent's counsel of bad faith, and the trial court of error and abuse of discretion, by mere implication.

Morgan v. Sun Oil Co., 5 Cir., 109 F. 2d 179, 181;
London Guarantee & Acc. Co. v. Woefle, 8 Cir., 83 F. 2d 325, 344;
Chicago & N. W. R. Co. v. Kelly, 8 Cir., 74 F. 2d 31, 37;

Chicago & N. W. R. Co. v. Kelly, 8 Cir., 84 F. 2d 569, 573;

Bobos v. Krey Packing Co., 323 Mo. 244, 19 S. W. 2d 630, 633;

Cordray v. City of Brookfield (Mo. Sup.), 88 S. W. 2d 161, 165;

Marlow v. Nafziger Baking Co., 333 Mo. 790, 63 S. W. 2d 115, 120;

Wendler v. People's House Furnishing Co., 165 Mo. 527, 65 S. W. 737, 741;

Irons v. American Railway Express Co., 318 Mo. 318, 300 S. W. 283, 292;

Monsour v. Excelsior Tobacco Co. (Mo. Sup.), 144 S. W. 2d 62, 68.

(D) The mere fact that the Supreme Court of Missouri found the verdict and judgment to be excessive when compared with awards in cases involving similar injury, and ordered a remittitur, is not in the slightest degree indicative that the verdict was the result of misconduct, passion and prejudice on the part of the jury caused by allegedly improper remarks of respondent's counsel.

Union Pacific R. Co. v. Hadley, 246 U. S. 330, 38 S. Ct. 318, 62 L. Ed. 751.

ARGUMENT.

I.

As we understand it, petitioner contends that the Missouri courts have improperly deprived it of its affirmative defense of release by ruling that an issue as to whether the written release was an existing and effective instrument could be made for the determination of the jury by parol evidence showing the instrument to have been delivered on condition, irrespective of the fact that the release contained language to the effect that it "contains the entire understanding." The Missouri courts indisputably so ruled, but, we submit, that ruling was entirely correct and proper.

(A) Effect of Delivery of Release Upon Condition.

The general rule governing the conditional delivery of a contract in writing is stated in 13 Corpus Juris, p. 307, § 131, and reiterated in 17 Corpus Juris Secundum, p. 414, § 64, as follows:

> "Of the execution of a contract in writing, delivery is ordinarily an essential element; and a delivery on condition is not a complete delivery until the condition is fulfilled."

This rule is firmly established in almost every American jurisdiction.

In *Ware v. Allen*, 128 U. S. 509, 9 S. Ct. 174, 32 L. Ed. 563, suit had been brought upon a promissory note for $10,000.00, and it was defended upon the ground that it was understood at the time of the signing and delivery of the paper to plaintiff that it was to be of no effect, unless the transaction was approved by one or both of the makers' attorneys, to the satisfaction of the makers of the note. One of such attorneys declined to give any opinion

or have anything to do with the transaction, while the other disapproved it emphatically. The makers of the paper promptly so advised the plaintiff. This Court, in this connection, said (128 U. S., l. c. 595-596):

> "We are of the opinion that this evidence shows that the contract upon which this suit is brought never went into effect; that the condition upon which it was to become operative never occurred, and that it is not a question of contradicting or varying a written instrument by parol testimony, but that *it is one of that class of cases, well recognized in the law, by which an instrument, whether delivered to a third party as an escrow or to the obligee in it, is made to depend, as to its going into operation, upon events to occur or be ascertained thereafter.*" (Emphasis supplied.)

To like effect is the decision in *Burke v. Dulaney*, 153 U. S. 228, 14 S. Ct. 816, 38 L. Ed. 698, another suit upon a note involving conditional delivery.

In *National Bank of Kentucky v. Louisville Trust Co.*, 6 Cir., 69 F. 2d 97, 102, it was said:

> "It was long ago established that, notwithstanding the parties might have gone through the form of executing a formal written contract, yet if it also had been agreed, be it only by parol, that such contract was not to take effect until the happening of some other event, and such subsequent event did not happen, the written contract will not be enforced even though it had been delivered to the obligee at the time of execution. Ware v. Allen, 128 U. S. 590, 9 S. Ct. 174, 32 L. Ed. 563."

In *American Surety Co. of N. Y. v. Egan*, 6 Cir., 62 F. 2d 223, 225, it was said:

> "It has long been settled that parol evidence is admissible to show that an instrument, unconditional

on its face, was delivered conditionally or upon an understanding that it should become effective upon the performance of some act."

The general rule above quoted from Corpus Juris was quoted, approved and followed in *Meredith v. Brock*, 322 Mo. 869, 17 S. W. 2d 345, 351-352, wherein it was said:

"It is well settled that one of the essential elements of a binding and enforceable written contract is a delivery of the written instrument evidencing such contract; and another, and correlative, essential element of an enforceable written contract is an acceptance of its delivery by the party to whom, or for whose benefit, such delivery is made. It is said in 13 C. J. 307, 308: 'Of the execution of a contract in writing delivery is ordinarily an essential element; and a delivery on condition is not a complete delivery until the condition is fulfilled * * *.'

"The term 'delivery' has been variously defined by the juristic authorities. One of the most satisfactory definitions of that term is found in Black v. Shreve, 13 N. J. Eq. 455, 561, wherein the term is held to mean, in legal phraseology, 'the final absolute transfer to the grantee [or promisee] of a complete legal instrument sealed [or signed] by the grantor, covenantor or obligor.' And, in Western Union Telegraph Co. v. Locke, 107 Ind. 9, 13, 7 N. E. 579, the delivery of a document or written instrument is said to import 'a surrender or parting with possession for a permanent purpose.' Again, 'delivery' has been described as a composite act; an act in which both parties must join and the minds of both parties must concur. 18 C. J. 478; Kinne v. Ford, 52 Barb. (N. Y.) 194, 197." (Bracketed portion supplied.)

In *Jordan v. Davis*, 108 Ill. 336, 340-341, it was said:

"The delivery of a written contract is indispensable to its binding effect, and such delivery is not conclusively proved by showing the placing of the paper by

> the alleged contracting party in the hands of the other. Delivery is a question of intent, and it depends whether the parties at the time meant it to be a delivery to take effect presently."

In. *Kilcoin v. Ortell*, 302 Ill. 531, 135 N. E. 16, 18, it was said:

> "The rule that contemporaneous oral statements cannot be heard to alter the terms of a written instrument presupposes execution and delivery of the writing with intent to bind the parties by its terms. * * * A delivery on condition is not a complete delivery, until the condition is fulfilled." (Authorities cited are omitted.)

In *Handley v. Drum*, 237 Ill. App. 587, 590, and again in *Tegtmeyer v. Nordlund*, 259 Ill. App. 247, 251-252, both of which cases were actions upon notes defended upon the ground of conditional delivery, the law is stated as follows:

> "It is a fundamental part of the law of contracts, to which there are very few exceptions, that a party to a written contract may not contradict the terms of that contract by parol. But it is equally well established that such a party may show that the contract claimed to exist was in fact never fully executed—that although it was signed by him, he never delivered it or that there was merely a conditional delivery and the condition has failed. In so doing, the written terms of the contract are not varied by parol but the showing made is merely to the effect that the contract never was completely executed."

That the foregoing principles relating to delivery of written contracts upon parol conditions are applicable in full force to releases, is clear from the authorities.

So, in *Mankin v. Bartley*, 4 Cir., 277 F. 960, a motion to quash an execution was filed in a personal injury suit,

upon the ground that the plaintiff had, during the pendency of an appeal from a judgment in his favor in the case, settled his case and executed and delivered to defendant a release of the judgment under seal. The motion was defended by plaintiff upon the ground that the release was delivered upon the express condition that the release and settlement should be approved by his attorneys, who had no knowledge thereof until afterwards, and, who, when they learned of it, strongly disapproved. The trial court denied the motion to quash the execution, and the Circuit Court of Appeals for the Fourth Circuit, in affirming this ruling said (l. c. 961-962):

> "* * * it is believed to be the settled rule of law, in Virginia as well as in other jurisdictions, that a contract under seal may be delivered on condition, and that parol evidence is admissible to show failure of compliance with the condition. * * * Whether or not the agreement signed by Bartley [i. e., the release under seal signed by the plaintiff] was delivered on the condition stated by him, which concededly had not been met, was a question of fact for the trial court to determine." (Bracketed portion supplied.)

In *Carr v. Weiss*, 215 Mass. 532, 102 N. E. 906, an action for damages was defended upon a release under seal allegedly given by plaintiff. At the trial, the defendant had requested, among others, an instruction that the only issue as to the release was whether it had been signed, and the Supreme Court of Massachusetts, in holding that this instrument was properly refused, said (102 N. E., l. c. 907):

> "If the release had been signed, but not delivered, it would not have been a bar."

In *Stiebel v. Grossberg*, 202 N. Y. 266, 95 N. E. 692, which was a suit upon a note defended upon the ground

that plaintiff had given defendant a release, the New York Court of Appeals said (95 N. E., l. c. 694):

> "A release, however, must be delivered in order to become effective. The delivery is a separate, independent act from that of executing [signing?] it." (Bracketed portion supplied.)

and after ruling that a release could be delivered conditionally, like any other writing, the Court there went on to say (95 N. E., l. c. 695):

> "The act of executing [signing?] releases is separate and distinct from acts of delivery. The delivery has to be shown independent of the instrument; and, while parol evidence is incompetent for the purpose of changing or explaining the meaning of the written instrument, we incline to the view that oral evidence may be given for the purpose of showing whether the delivery of the instrument was intended to be absolute or conditional." (Bracketed portion supplied.)

In *Halloran v. Fischer*, 126 Conn. 44, 9 A. 2d 290, plaintiff's action for rent was defended by defendant upon a release which plaintiff had signed and left with defendant's attorney, to be delivered to the defendant upon his payment of the consideration named therein—which defendant never paid. The Connecticut court, concerning this defense, tersely said (9 A. 2d, l. c. 293):

> "The claim that the release discharged the indebtedness is answered by the fact that it was delivered * * * upon a condition never fulfilled. The release did not become effective until the condition had been performed * * *."

(B) Parol Evidence Is Admissible and Sufficient to Establish Conditional Delivery.

Although many of the decisions just above discussed clearly show that parol evidence is competent and sufficient to establish that a delivery of a written instrument was conditional, let us direct attention to 32 Corpus Juris Secundum, p. 875, § 935, where the headnote reads:

> "In general, *parol evidence is admissible to show conditions precedent, which relate to the existence of a valid contract,* but is not admissible to show conditions subsequent, which provide for the nullification or modification of an existing contract." (Emphasis supplied.)

and in the body of the text there it is said:

> "* * * parol evidence is admissible to show conditions precedent, which relate to the delivery or taking effect of the instrument, as that it shall only become effective on certain conditions or contingencies, for *this is not an oral contradiction or variation of the written instrument but goes to the very existence of the contract and tends to show that no valid and effective contract ever existed;* * * *." (Emphasis supplied.)

(C) Language of Release Here Involved Does Not Alter the General Principles Applicable.

Petitioner here, while evidently recognizing every principle and rule of law heretofore discussed in this argument, has taken the position that the particular release here involved does not come within them because it contains the sentence—which is generally found in releases—that:

> "The payment of said sum [$3,500.00] is the only consideration for this release, *which contains the entire understanding.*" (Emphasis and bracketed portion supplied.)

The petitioner's contention is that the emphasized words in this sentence conclusively establish that the entire understanding of the parties is contained in the release, and that, therefore, parol evidence that the release was delivered on condition would have the effect of altering, varying or contradicting those very words in the instrument.* We believe that it readily can be demonstrated that this contention is fallacious, and that these particular words do not have the effect ascribed to them by petitioner.

In the first place, petitioner's contention erroneously assumes that the release here involved was an existing, effective instrument, and thereby assumes the very matter in issue. If the release was not an existing, effective instrument, the language in it saying that it "contains the entire understanding" cannot be given effect. In the light of respondent's denial of its execution, under oath in his reply, the burden was upon petitioner to establish the execution—i. e., both the signing and the complete delivery—of the instrument which it had pleaded by way of affirmative defense. The admitted facts that respondent had signed the instrument and put it in petitioner's possession did not establish complete execution of the instrument because:

> "* * * delivery is not conclusively proved by showing the placing of the paper by the alleged contracting party in the hands of the other. Delivery is a question of intent, and it depends whether the parties at the time meant it to be a delivery to take effect presently." (*Jordan v. Davis*, 108 Ill. 336, 340-341.)

Thus, parol evidence was not only admissible and sufficient, but was necessary, to show the intent with which respond-

* Let us here say that respondent fully recognizes the rule that parol evidence is not admissible, competent or sufficient to vary, alter or contradict the terms of a written instrument relative to its subject matter. As we view them, all of the authorities relied upon by petitioner do no more than announce that rule, and, accordingly, will not undertake any discussion of them.

ent put the instrument in petitioner's possession—i. e., whether the delivery was conditional or unconditional. Such evidence was not for the purpose of varying, altering or contradicting the terms of the instrument, but for the purpose of showing whether or not the instrument ever came into existence and effect. All of the authorities hereinbefore cited and relied upon by us at least inferentially so hold, and many of them specifically so hold.

In the second place, petitioner's contention erroneously assumes that the language in the release, saying that it "contains the entire understanding," relates to the matter of delivery vel non of the instrument. *The release here involved says nothing whatsoever about its delivery, or the time or circumstances under which it should become effective.* Even a most casual reading of the context of the instrument will demonstrate that the phrase of it so strongly relied on by petitioner relates and is limited to the understanding with respect to *the consideration for the release*, and has nothing whatsoever to do with any matter respecting *the delivery of the instrument.* The language immediately preceding that phrase, the balance of the language preceding the sentence which includes that phrase, and the sentence following that phrase, deal solely and only with *the consideration* for the release.

Parol evidence that the release was delivered upon a condition precedent—i. e., upon condition that the proposed settlement of respondent's claim and suit be approved by his attorney, Mr. Wilbourn—did not, and could not, have the effect of varying, altering or contradicting the terms of the release respecting the consideration for it. Respondent did not, and does not, attempt to vary, alter or contradict any of the terms or provisions of that instrument, the context of it, or the consideration for it, but he does assert and insist that it was never completely executed, and never became an existing and effective instrument, because it was delivered upon a condition which was never fulfilled.

The question in this case was, and is, not whether the terms of the release can be varied, altered or contradicted, but whether, as respondent's evidence showed, the instrument was delivered upon a condition that the proposed settlement of his claim and suit be approved by one of his attorneys, Mr. Wilbourn. If petitioner's evidence had, like that of respondent, shown that the release was delivered upon such condition, there could be no doubt in any mind that the release never became an existing and effective instrument, no matter what the language of the release might have been. The circumstance that petitioner's evidence in this connection was contradictory to that of respondent, and tended to show that the delivery of the release was unconditional, did no more than to create and present an issue of fact for the determination of the jury. That determination was that the instrument was delivered upon a condition precedent which concededly never was fulfilled, so that the release never went into effect as a binding instrument.

It is, we believe, quite clear that the rulings of the Missouri courts respecting petitioner's pleaded defense of release were entirely correct and proper.

II.

(A) Nonprejudicial Error Is to Be Disregarded.

Petitioner also seeks review of this case because of alleged error by reason of certain statements made by counsel for respondent in his opening statement to the jury and in his argument to the jury. Before considering the details in this connection, let us point out that it is provided by the Act of February 26, 1919, c. 48, 40 Stat. 1181 (28 USCA, § 391), that:

> "On the hearing of any appeal, certiorari, writ of error or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an ex-

amination of the entire record before the court, without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties."

A similar statute exists in Missouri, where the case at bar was tried. (See: Revised Statutes of Missouri 1939, § 1228.)

Under these and similar statutes, it is universally held that errors not affecting the substantial rights of a party in a case must be disregarded, and that prejudicial error will not be presumed. As to the application of these principles in cases involving alleged prejudicial statements or argument of counsel, see *Sebastian Bridge District v. Missouri Pacific R. Co.*, 8 Cir., 292 F. 345, 349, and *Morgan v. Sun Oil Co.*, 5 Cir., 109 F. 2d 179, 181.

(B) As to Error in the Opening Statement of Respondent's Counsel.

Petitioner makes several charges of misconduct on the part of respondent's counsel during his opening statement of the case.

The first of these incidents occurred when, in telling the jury that the evidence would show that, after this suit had been instituted, the petitioner's claim agent began paying visits to respondent's home, respondent's counsel referred to the fact that the ethics of the Bar and the rules of the Supreme Court of Missouri prevented lawyers from going directly to a person represented by another lawyer and attempting to negotiate with him a settlement, and then went on to say, over the objection of petitioner (R. 20):

"* * * I think the evidence will show you gentlemen—we expect to show you that for that reason that an attorney who would do that would be subject to discipline; that they had a man who is not an attorney, Heilig, who is not admitted to the Bar—they had

him go out to see this man, because not being a member of the Bar he could go ahead and do the job, so they thought, without being disciplined, that is to say, without being thrown out of the Bar Association or something of that kind."

At the time counsel made this reference to the matter of ethics and the rule of the Supreme Court of Missouri, the pleadings in this case presented a live issue in that regard, because respondent's reply had alleged (R. 9-10) that petitioner, although represented by counsel in the case and knowing that plaintiff was also represented by counsel therein, as a part of a plan to receive a release and discharge of respondent's claim and suit without knowledge of his attorneys, had sought to circumvent the canons and rules by having one of its claim agents, Heilig, who was not a lawyer and not subject to disciplinary action under such canons and rules, effect a settlement of respondent's claim and suit directly with respondent.* With that live issue in the case, neither the trial court nor respondent's counsel could anticipate what evidence might be adduced in that connection. Counsel in their opening statements to juries are authorized to state in good faith their claims as to the law and the facts so far as the same are necessary to enable the jury to understand the case, and will not be deemed to have committed prejudicial error in the absence of bad faith, the determination of the good faith of counsel being within the discretion of the trial court (*Buck v. St. Louis Union Trust Co.*, 267 Mo. 644, 185 S. W. 208, 212; *F. L. Dittmeier Real Estate Co. v. Southern Surety Co.* [Mo. Sup.], 289 S. W. 877, 888; *State ex rel. Kansas City Public Service Co. v. Shain*, 345 Mo. 543, 134 S. W. 2d 58, 61; *Thompson v. St. Louis Southwestern R. Co.* [Mo. Sup.], 183 S. W. 631, 636; *Dees v.*

* That there was such a plan, is manifest from the evidence that, about a week before he saw respondent to propose a "direct settlement," Heilig had received from his superiors specific orders to effect a direct settlement with respondent (R. 124).

Skrainka Constr. Co. [Mo. Sup.], 8 S. W. 2d 873, 878). Both the trial court and the Supreme Court of Missouri ruled that, in the instance now under consideration, the statements of respondent's counsel amounted to no more than what the evidence actually showed respecting the conduct of petitioner and its claim agent (R. 187; 177 S. W. 2d, l. c. 440-441).

Another incident in the opening statement of respondent's counsel, which is complained of by petitioner here, occurred when he referred to a Mrs. Artz as a "stool pigeon" for the Railroad (R. 22-23). According to Webster's New International Dictionary, 2d Ed., Unabridged, the term "stool pigeon" means "A person used as a decoy for others." The fact is that the evidence tended strongly to show that Mrs. Artz was just that. She was the wife of one of petitioner's bridge foreman (R. 26), who lived in a town some three miles from respondent (R. 44). Her husband also had been injured, and was in the hospital at the same time respondent was, and they became acquainted there (R. 44). After respondent left the hospital, Mrs. Artz called at his home on several occasions (R. 44). She and her husband had "repeatedly" discussed with petitioner's claim agent, Heilig, respondent's claim and suit against petitioner, and had told the claim agent that they believed respondent would want to settle his claim "direct," and that they would let the claim agent know about that when it occurred (R. 125). Petitioner's claim agent had seen Mr. and Mrs. Artz earlier on the very day that he had first discussed with respondent such a "direct settlement" (R. 126), and at that time the claim agent had in mind that perhaps they would have some information for him about respondent (R. 125). It is highly significant, in this connection, that Mrs. Artz was in the court room at the time respondent's counsel made his reference to her, she having been brought by petitioner from her home in Illinois to St. Louis for the trial (R. 127), but she

did not remain throughout the trial, and was not offered as a witness in the case. Certainly, respondent's counsel had good reason to believe, and in good faith did believe, that the evidence would show that Mrs. Artz was a decoy being used by petitioner for its own ends in connection with securing a so-called "direct settlement" of respondent's claim, and his statement to that effect was not in the least degree improper or erroneous. The Supreme Court of Missouri, in passing upon this matter, said that it was unable to perceive how it could have prejudiced petitioner (R. 188; 177 S. W. 2d, l. c. 441).

Another incident complained of by petitioner was that which occurred when respondent's counsel, in the course of his opening statement, said (R. 24):

> "He [Heilig] was in his hunting clothes; he was hunting ducks or something that had come into season, and he was out after ducks with a gun and out after Kelley with a pen.
>
> Mr. Gentry: I object to that statement as highly prejudicial.
>
> The Court: Sustained as to that last.
>
> Mr. Gentry: Ask the Court to tell the jury to disregard it.
>
> The Court: Disregard that last statement." (Bracketed portion supplied.)

Merely reading the record respecting this incident demonstrates that it furnishes no ground for review. Petitioner's objection to the statement was promptly sustained, and its motion that the jury be instructed to disregard the statement, was, likewise, promptly sustained. Petitioner's counsel was evidently fully satisfied that any harm from the incident had been overcome by the trial court's rulings—as it was. There is, simply, nothing for review respecting this incident because it is axiomatic that:

"Absent an adverse ruling and exception thereto, there is nothing before us for review" (*Osby v. Tarlton*, 336 Mo. 1140, 85 S. W. 2d 27, 31).

See, also, *Ocean Accident & Indemnity Co. v. Penick & Ford*, 8 Cir., 101 F. 2d 493, 500 [17-21], and *Graham v. United States*, 231 U. S. 474, 34 S. Ct. 148, 151-152, 58 L. Ed. 319.

Another incident, now complained of by petitioner for the first time, was a reference in the opening statement of respondent's counsel to the effect that the testimony would show that petitioner's claim agent, in attempting to get respondent to settle his suit, told respondent that he had better not go ahead with the suit because the Illinois Central was big and powerful and would scatter the witnesses so that respondent wouldn't get any place (R. 21). The evidence clearly shows that there was some discussion between respondent and petitioner's claim agent about the scattering of witnesses (R. 122-123), and the facts that the claim agent first categorically denied, and then conceded, that such a discussion took place, clearly indicate that respondent's counsel was acting in good faith when he made the statement which he did make in those connections. Furthermore, the fact that there was no objection made to counsel's statement precludes any prejudice to petitioner therefrom (*Ocean Accident & Indemnity Co. v. Penick & Ford, supra.*)

(C) As to Error in the Argument of Respondent's Counsel to the Jury.

Petitioner also contends for reversible error in connection with the argument to the jury, during the course of which respondent's counsel said (R. 156):

"* * * In his phony argument that the General Attorney [Mr. Freels] made—came down here in his

pompous dignity—he said the only reason he got into it—he's too good for us—the only reason he got into this thing was that his own conscience shuddered when he thought of the contract. He wasn't going to take part. When did he learn of the 50 per cent contract? He wasn't going to take part in it, he said. That's a phony statement because his own claim agent says he learned of the 50 per cent contract the night he tried to perpetrate the crime.

Mr. Gentry: If your Honor please, I object to that statement about perpetrating a crime.

The Court: It's sustained.

Mr. Gentry: Ask the Court to tell the jury to disregard it.

The Court: Disregard that last statement." (Bracketed portion supplied.)

The Supreme Court of Missouri, in ruling this incident to not constitute error prejudicial to petitioner, noted that the full arguments of counsel were not preserved in the record; that the objection made went only to the statement about petitioner's claim agent, Heilig, having "perpetrated a crime," and that the trial court promptly and emphatically sustained the objection to, and instructed the jury to disregard, such statement (R. 188-190; 177 S. W. 2d, l. c. 442). These matters preclude this incident from constituting error prejudicial to petitioner.

It is manifest that this argument was made in response to, and was invited by, argument made by Mr. Freels, petitioner's general attorney, who is of counsel in this case, although petitioner, for reasons best known to it, did not include Mr. Freels' argument in the printed record herein. The doctrines applicable under those circumstances are stated in *London Guarantee & Accident Co. v. Woelfle,* 8 Cir., 83 F. 2d 325, as follows:

"Counsel for an appellant who has been injured by improper argument to the jury should not ordinarily

> be permitted to take advantage of errors which he has invited or provoked * * *" (l. c. 343),

and, further:

> "* * * to secure from this court, as a matter of right, a reversal of a judgment because of improper remarks of counsel in an argument made to a jury, the bill of exceptions must contain all arguments in full * * *" (l. c. 344).

All of the authorities cited under point II, B, of our summary of the argument herein are to this effect, and the basis for these principles was tersely stated in *Wendler v. Peoples House Furnishing Co.*, 165 Mo. 527, 65 S. W. 731, 747, as follows:

> "The trial court having heard all the argument, is in a much better position to know whether an improper influence has been exerted, than an appellate court can possibly be, with only a fragment of the speech quoted."

It is manifest that the word "crime" was used by respondent's counsel, not in its technical legal sense, but in its colloquial sense as meaning "something reprehensible or disgraceful" (see: Webster's New International Dictionary, 2d Ed., Unabridged), and it is unlikely—in fact, it is inconceivable—that a jury of reasonably intelligent persons could interpret its use otherwise. However, in any event, petitioner's objection to the use of the term was promptly sustained, and upon petitioner's motion the jury was promptly instructed to disregard the statement made. The trial court thereby clearly and emphatically disapproved the argument of, and in effect rebuked, respondent's counsel, so that the error, if any, was promptly and effectively cured and petitioner could not have been prejudiced thereby. Any other holding would, by mere implica-

tion or presumption, convict respondent's counsel of bad faith, and the trial court of an abuse of its large discretion in permitting or restraining arguments.

(D) Excessive Verdict Not Demonstrative of Prejudicial Misconduct of Counsel.

In attempting to demonstrate that the statements and argument of respondent's counsel complained of by petitioner were prejudicial to it, petitioner points to the fact that the Supreme Court of Missouri found respondent's verdict and judgment to be excessive (R. 192; 177 S. W. 2d, l. c. 443), and assumes that an excessive verdict necessarily is the result of misconduct, passion and prejudice on the part of the jury. The attempted demonstration, however, fails completely.

An examination of the opinion of the Supreme Court of Missouri establishes that that Court ruled the respondent's verdict and judgment to be excessive because it exceeded the awards for similar injury in other cases, and because that Court is committed to a doctrine that there should be a reasonable uniformity in that regard (R. 190-192; 177 S. W. 2d, l. c. 442-443). In a similar situation, in *Union Pacific R. Co. v. Hadley*, 246 U. S. 330, 38 S. Ct. 318, 62 L. Ed. 751, this Court held that the requiring of a remittitur was not demonstrative of misconduct on the part of the jury, saying (38 S. Ct., l. c. 319):

> "The Court had the right to require a remittitur if it thought, as naturally it did, that the verdict was too high. Beyond the question of attributing misconduct to the jury, we are not concerned to inquire whether its reasons were right or wrong."

So, here, the fact that the Supreme Court of Missouri required a remittitur from respondent's verdict and judgment, when considered in the light of the reason for that

requirement, is not in the slightest degree demonstrative that the verdict was the result of misconduct, passion and prejudice on the part of the jury caused by allegedly improper remarks of respondent's counsel. Furthermore, the Supreme Court of Missouri specifically held that there was no conduct on the part of respondent's counsel which was prejudicial to petitioner.

The foregoing clearly distinguishes the instant case from *Minneapolis, St. P. & S. S. M. R. Co. v. Moquin,* 283 U. S. 520, 51 S. Ct. 501, 75 L. Ed. 1243, so strongly relied upon by petitioner. In the Moquin case, the Supreme Court of Minnesota clearly and unequivocally ruled that the verdict was "excessive because of passion and prejudice" on the part of the jury—the direct opposite of the ruling of the Supreme Court of Missouri in this case—and this Court there held no more than that a remittitur could not cure the error in a verdict *obtained by passion and prejudice,* because it would be mere speculation to attempt to calculate the extent of the wrong inflicted thereby.

The decision in *New York Central R. Co. v. Johnson,* 279 U. S. 310, 49 S. Ct. 300, 73 L. Ed. 706, so strongly relied upon by petitioner, also is distinguishable from the case at bar, because in that case there was a most aggravated case of misconduct on the part of a plaintiff's counsel in the use of bitter, vituperative and passionate language, and of unfair comment, in many, if not in all, instances without supporting evidence. There simply is no such situation in the case at bar.

CONCLUSION.

In conclusion, we most respectfully submit that there was, and is, no error in the opinion and decision of the Supreme Court of Missouri in this case; that the verdict and judgment in this case are manifestly for the right

party, and, as reduced by remittitur in the court below, are reasonable in amount; that the issuance of a writ of certiorari to review that opinion and decision could serve no useful purpose; and that the petitioner for writ of certiorari should, accordingly, be denied.

Respectfully submitted,

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ASA J. WILBOURN,
Of Counsel.